United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1220

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1220

UNITED STATES OF AMERICA

APPELLEE

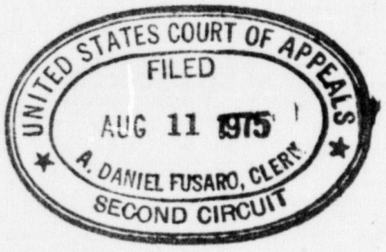
V.

LEO HENDRICKS

APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT



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CITATIONS

STATUTES INVOLVED

I. Title 26, United States Code Section 5861:

It shall be unlawful for any person - (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

II. Title 44, United States Code Section 921(a)(4):

The term destructive device means -

(A) Any explosive, incendiary, or poison gas -

(i) bomb
(ii) grenade
(iii) rocket having a propellant charge of more than four ounces
(iv) missile having an explosive or incendiary charge of more than one quarter ounce
(v) mine, or
(vi) device similar to any of the devices described in the preceding clauses;

(B) Any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one half inch in diameter; and

(C) Any combination of parts either designed or intended for use in converting any device into a destructive device described in subparagraph (A) or (B) and from which a dectructive device may be readily assembled.

STATEMENT OF CASE

This is an appeal from a judgment of conviction and from the denial of appellant's Motion to Dismiss and Motion to Exclude Testimony, both of which motions were denied from the bench by the Honorable M. Joseph Blumenfeld, U.S.D.J., on March 17, 1975.

The appellant was charged (see Indictment, app. 5) with a co-defendant, Evelyn Cora Parracino, with willfully and knowingly receiving and possessing firearms, that is two destructive devices (explosive or incendiary firebombs), which firearms, i.e. destructive devices, had not been registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26, U.S. Code, Section 5861(d). The appellant and Miss Parracino commenced trial before the Honorable M. Joseph Blumenfeld and a jury on January 15, 1975. During the second day of trial, a mistrial was declared in the case against Hendricks for reasons which will be more particularly hereinafter set forth. The trial was continued against the co-defendant, Evelyn Cora Parracino, and she was ultimately acquitted by the jury on January 17, 1975. On January 22, 1975 the Government filed a Notice of Readiness to proceed with a retrial against the appellant. On March 5, 1975 the appellant filed a Motion to Dismiss the Indictment and on March 7, 1975 he filed a Motion to Preclude the Government from

introducing the testimony of Steven Duffen in the retrial (app. 7-9). Oral argument was held on both these motions on March 17, 1975 and they were denied from the bench by Judge Blumenfeld on that date.

The appellant's second trial commenced on March 18 and the Government again called Steven Duffen as a witness who testified to substantially the same matters he had testified to in the first trial. On March 20, 1975 the jury, after approximately five hours of deliberation, returned a verdict of guilty against the appellant.

The appellant was sentenced on June 2, 1975 by Judge Blumenfeld to a term of five years in prison. A Notice of Appeal was timely filed on June 10, 1975 (app. 6).

QUESTIONS PRESENTED

1. Whether the Court Erred in Refusing to Dismiss the Indictment After the Mistrial for the Reason that a Retrial of the Appellant Placed Him in Double Jeopardy.

2. Whether the Court Erred in Refusing to Preclude the Introduction of Steven Duffen's Testimony in the Retrial in Light of the Government's Failure to Provide Defense Counsel with a Complete and Accurate Transcript of his Grand Jury Testimony.

3. Whether the Court Erred in its Instruction to the Jury Re Constructive Possession.

STATEMENT OF FACTS

Early in the morning of September 19, 1973 the apartment of one Deflin Davis, 194 Washington Street, Hartford, Connecticut, was firebombed. A few days thereafter the appellant and one Andrew Johnson were arrested by State authorities on a charge of arson in connection with the firebombing. On December 21, 1973 the appellant and Evelyn Cora Parracino were indicted in the U.S. District Court for receiving and possessing an unregistered incendiary device in violation of Title 26, U.S. Code Section 5861(d). Both defendants pleaded not guilty and commenced trial before Judge Blumenfeld and a jury on January 14, 1975.

It was appellant's contention during all stages of these proceedings that the co-defendant Parracino and Andrew Johnson were the parties who in fact had firebombed Davis' apartment. This theory was substantiated by the testimony of an eyewitness, Jack Barnes, who testified for the Government during the first trial and for the appellant during the second trial. Barnes testified that early in the morning of September 10, 1973 he had heard a car pull up and screech to a halt outside his apartment window. Barnes' apartment was located at ground level of the apartment complex in which Deflin Davis lived. He stated that he looked out of the window

and saw a white female who he identified as Evelyn Parracino, standing next to a brown Buick. He then saw Parracino throw two firebombs into the upper level of the apartment complex. The only other individual that he saw in the area at the time was the driver of the vehicle whom he described as a white male. Andrew Johnson is a white male while the defendant is unmistakably a negro. Furthermore, the evidence disclosed that Evelyn Parracino owned and drove a brown Buick similar to the one seen by Barnes outside his apartment window.

During the first day of trial the Government called Steven Duffen, a convicted felon and prison inmate as a witness. Duffen testified on direct examination that on the night of September 9, 1973 the appellant had approached him to enlist his aid in firebombing Davis' apartment. Prior to trial Government had provided defense counsel with copies of Duffen's written statements and a transcript of what purported to be his Grand Jury testimony (app. 10). Page 7 of the Grand Jury transcript sets forth Duffen's testimony concerning the conversation he had with another individual referred to only as "she", at the victim's apartment a few days after the fire. While cross-examining Duffen, appellant's counsel attempted to elicit testimony concerning this conversation in an attempt to impeach his credibility. Objections to this line of inquiry were sustained and Hendricks abandoned that area of questioning (Tr. I pp. 152-153),[1] Thereafter, notwithstanding the previous

[1]References to transcript pages of the first trial will be "Tr. I" and to the second trial "Tr. II."

objections, the Court, the co-defendant and the Government inquired into the meeting and the conversation that allegedly occurred at the victim's apartment.

In response to these questions the witness testified that he visited the scene of the fire with the appellant and that the appellant had showed him how much damage was done and had said "now see how much space I had to work with" (Tr. I pp. 162-163; 168-170; 222; 229; 230). When appellant's counsel sought to cross-examine the witness on the basis of the Grand Jury testimony which indicated that it was a "she" who had showed him the damage and had made the statement to him, counsel for the Government requested a conference at the bench and indicated to the Court that the portion of the Grand Jury testimony in question did not refer to this particular case but dealt with other matters then pending before the Grand Jury. (Tr. I pp. 174-176)

The following day, at the Court's request, the stenographer who took Duffen's Grand Jury testimony was called as a witness. She testified that she had compared her stenographic notes with the transcript and had found them to be the same. She further testified that her notes definitely indicated that Duffen had said "she" had showed him how much damage was done and "she" had made the statement quoted on page 7 (Tr. I pp. 191-192).

Based on this testimony, the appellant moved for a mistrial. During arguments on the motion, the Government attorney again represented that the Grand Jury testimony in question was not related to this case. (Tr. I p. 202) The motion for mistrial was denied. Subsequently, Steven Duffen testified that, in fact, his Grand Jury testimony did relate to this case and that the references to "she" in the transcript referred to one Bella Kil, who had previously been mentioned in the Grand Jury testimony, but that this previous reference does not appear in the transcript (Tr. I p. 236). Duffen further testified that the transcript given defense counsel was not a copy of his Grand Jury testimony (Tr. I p. 228). He also insisted that he had said that Hendricks, and not "she" had made the statement on page 7 (Tr. I p. 229). The Government then abandoned its previously stated position that the portion of the Grand Jury testimony in question did not refer to this case and accepted Duffen's explanation of the mixup. Thereafter, the Court, apparently as a result of this constant changing of positions on the part of the Government, ordered a mistrial on the case against Hendricks but ordered the trial to proceed as against Parracino. The jury ultimately acquitted the co-defendant, Parracino.

Shortly after Parracino was acquitted the Government announced its intention to retry Hendricks. Hendricks filed a

Motion to Dismiss the Indictment, claiming that a retrial under the circumstances of this case would place him twice in jeopardy for the same offense; that certain off-the-record discussions between the Government attorney and others in front of the Grand Jury could have so prejudiced the Grand Jury as to affect their deliberations, and; that the Government was not ready to properly try this matter within six months from the date of indictment as required by the rules regarding prompt disposition of criminal cases (app. 8-9). Appellant also filed a Motion to Preclude the Government from introducing the testimony of Steven Duffen unless and until it was able to provide defense counsel with a full and accurate transcript of his Grand Jury testimony. Both motions were denied by Judge Blumenfeld without opinion.

Duffen again testified for the Government at the second trial and again testified to the conversation he claims he had with Hendricks at Davis' apartment a few days after the fire. The Government did not provide defense counsel with any transcript of his Grand Jury testimony other than the one which Duffen had stated was not accurate or complete.

ARGUMENT

1. The Court's Denial of Appellant's Motion to Dismiss the Indictment Placed Him in Double Jeopardy.

The 5th Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb". The prohibition of this clause is clearly not only against twice punishing a citizen for the same offense but also against twice placing him in jeopardy. United States vs. Ball, 163 U.S. 662, 669 Admittedly, the double jeopardy clause was not designed to limit the Government, in every instance, to but one attempt at obtaining a conviction. The complex rules of trial procedures and the clash engendered by our adversary proceedings would make such a rule unworkable. It has long been settled that a Court may discontinue a trial when it finds from all the circumstances that there is a "manifest necessity" for so doing, or that the ends of justice would otherwise be defeated. Wade vs. Hunter, 336 U.S. 684, 690 (1949); United States vs. Perez, 9 Wheat. 579 (1824) The question raised by the defendant's Motion to Dismiss was under what circumstances does the double jeopardy clause prohibit the Government from retrying the defendant after the declaration of a mistrial.

The Courts have found several different situations where a defendant may be retried after an initial trial is terminated prior to a verdict. These include illness or incapacity of the judge; disqualification of a juror; a hopelessly deadlocked jury and other such situations where there is a breakdown of the judicial machinery. See, Gori vs. United States, 367 U.S. 364, 372 (1961) (Douglas dissenting); Annot., 6th L. Ed. 2d, 1510. On the other hand, there are equally clear examples of situations where reprosecution is not allowed. These include the harassment of an accused by successive prosecutions or conduct on the part of the Government intentionally designed to cause a mistrial when a case is going badly for it. Gori vs. United States, 367 U.S. at 369.

The instant case presents none of the foregoing extreme situations. Here we had neither a breakdown of judicial machinery, harassment nor intentional misconduct on the part of the prosecution. This mistrial was caused solely by prosecutorial oversight, mistake and negligence without any act of the defendant contributing thereto. Similar examples of prosecutorial error have, however, been found sufficient to bar reprosecution. In Downum vs. United States, 372 U.S. 734 (1962) the defendant was indicted on six counts. After the

jury was selected and sworn, the Government's attorney discovered that his key witness on two counts of the indictment was not present and had not been subpoenaed. The defendant moved for dismissal of the two counts, which motion was denied, and the Court declared a mistrial. When the case was again called for trial, the defendant's plea of double jeopardy was overruled. The defendant was convicted at the second trial and, on appeal, the Supreme Court reversed, holding that the plea of double jeopardy should have been sustained in that the prosecutor's oversight and negligence unduly deprived the defendant of his valued right to have a trial completed by a particular jury and unduly subjected him to the anxiety, embarrassment and financial strain of a second prosecution.

In United States vs. Ball, 163 U.S. 667, three individuals were brought to trial on a murder indictment. Two of the defendants were convicted and one acquitted. On appeal, the two convictions were overturned because of a defect in the indictment. The prosecutor obtained a new indictment against all three individuals including the one who had been acquitted. At the second trial all three individuals were convicted and the Supreme Court reversed Ball's conviction on the grounds that his retrial, after acquittal, constituted double jeopardy. The Court held that the prosecutors own negligence in failing to

draft a proper indictment could not justify the retrial of a man previously brought to trial under the defective indictment.

Mr. Justice Douglas, in his dissenting opinion in Gori vs. United States, stated:

> "The prosecution must stand or fall on its performance at trial. I do not see how a mistrial directed because the prosecution has no witness is different from a mistrial directed because the prosecutor abuses his office and is guilty of misconduct." 367 at 372

The double jeopardy clause of the 5th Amendment was designed to protect two valuable rights of an accused: (1) the right to have his trial completed by the particular tribunal summoned to set in judgment on him; (2) the right to be free from the expense, anxiety and embarrassment of successive prosecutions. Wade vs. Hunter, 336 U.S. at 690; United States vs. Glover, 506 F.2d 291 (2d Cir. 1974). By permitting a retrial under the circumstances of this case, the District Court deprived the defendant of both of these rights while condoning the negligence of the Government. The defendant's right to be tried by a particular jury is especially significant here in light of the jury's acquittal of the co-defendant. There is reason to believe that the first jury, which apparently disbelieved the Government's case against the co-defendant would have been of a similar mind with regard to the case against Hendricks. However, the Government's negligence has prevented the defendant from being tried by this particular jury.

The Government claimed that reprosecution was allowable for the reason that the mistrial was declared "in the sole interest of the defendant." See, Gori vs. United States, 367 at 369. The mistrial in this particular case served to benefit the Government as much as, if not more than, the appellant. The Government had a difficult task of proving the guilt of either party at the first trial because much of the testimony which implicated the defendant, Hendricks, tended to exculpate the co-defendant, Parracino. Conversely, the testimony which tended to inculpate Parracino pointed towards the innocence of Hendricks. Therefore, the mistrial was of substantial benefit to the Government in that it allowed the United States Attorney to concentrate his proof against Miss Parracino without running the risk of creating a doubt in the jury's mind as to the guilt of Hendricks. Similarly, in the retrial, the Government could concentrate its proof against Hendricks without worrying about its effect on the case against Miss Parracino. Accordingly, it cannot be said that the mistrial was "in the sole interest of the defendant," See, United States vs. Jorn, 400 U.S. 470 (1971).

The fact that the mistrial was declared upon motion made by the defendant does not automatically remove all barriers to reprosecution.

> "Using a defendant's consent to a mistrial to bar his subsequent complaint of double jeopardy implies that he has bound himself to accept abandonment of the first trial by exercising something more substantial than a Hobson's choice." United States vs. Dinitz, 492 F.2d 53, 59 (5th Cir. 1974)

Here, Hendricks had no choice but to move for and accept a mistrial. The Government had misled him into pursuing a line of inquiry highly prejudical to his case by providing him with an inaccurate and incomplete transcript of the witness's Grand Jury testimony. This line of inquiry was carried further by the Court, the attorney for the Government and the attorney for the co-defendant, resulting in the jury being made fully aware of testimony that Hendricks was present at the scene a few days after the fire and that he allegedly uttered a highly incriminating statement. Once this evidence was before the jury, no curative instruction could remove its prejudicial effect. Furthermore, nothing in Duffen's Grand Jury testimony would lead defense counsel to believe that the incident described on page 7 occurred between Duffen and Hendricks, rather than Duffen and a woman as the transcript clearly indicates. Accordingly, the appellant had no choice but to accept a mistrial, but in so doing he cannot be held to have waived his right against being placed in double jeopardy.

"Even in cases where there is no possibility of manipulation or prejudice to the Defendant beyond that of undergoing another trial, the double jeopardy clause will bar

reprosecution unless there is an important countervailing interest of proper judicial administration." United States ex rel Russo vs. Superior Court of New Jersey, 483 F.2d 7, 14 (3rd Gir. 1973); citing, Illinois vs. Sommerville, 410 U.S. 458 (1973).

There was no important countervailing interest of proper judicial administration to require that the appellant should have been retried on this indictment and the matter should therefore have been dismissed.

2. The Court Erred in Denying Appellant's Motion to Preclude the Introduction of Duffen's Testimony.

According to Steven Duffen, the transcript of his Grand Jury testimony that was provided to defense counsel by the Government was neither complete nor accurate. He testified unequivocally that the transcript in defense counsel's possession was not a copy of his Grand Jury testimony (Tr. I p. 228) and that some of his testimony, specifically that relating to an individual known as Bella Kil was omitted from the transcript (Tr. I p. 236). He further indicated that the reference to a conversation he had with a "she" as related on page 7, was an error in transcription (Tr. I p. 237) and should have referred to a "he" meaning Leo Hendricks. The court reporter who recorded the testimony testified that she had transcribed all of Duffen's testimony except for a portion which the Assistant U.S. Attorney told her would be "off the record" (Tr. I pp. 187-188). She further testified that she had been instructed by the U.S. Attorney's office not to note in the transcripts when off-the-record discussions were held.

It is obvious that the Government did not comply with the Jencks Act by supplying defense counsel with all the

statements made by Duffen to the Grand Jury. Rather, only a portion of those statements, and apparently an inaccurate transcript of that portion, was provided. Prior to the start of the second trial, appellant moved to exclude Duffen's testimony unless and until a complete and accurate transcript of his Grand Jury testimony was provided by the Government. The Court denied this motion summarily indicating that he could not order the Government to produce what they did not have. The Court, in denying the motion, failed to recognize that the reason the Government did not have a complete and accurate transcript was because of the Assistant U.S. Attorney's own conduct in telling the reporter not to transcribe certain portions of the Grand Jury's proceedings. In issuing this order to the reporter, the Government had, in effect made an election not to turn over certain portions of Duffen's statements to the Grand Jury to defense counsel. Had such an election been made at trial, counsel could have moved to have Duffen's testimony stricken. 18 U.S.C. Section 3500(d). Because the election was, in effect, made prior to trial and all parties concerned were aware that the entire testimony was not to be made available to defense counsel, a pretrial motion to exclude Duffen's testimony was proper and should have been granted.

3. The Court Incorrectly Charged the Jury on the Concept of Constructive Possession.

During the second trial, the jury retired to begin deliberations at approximately 11:40 a.m. on March 20. During the next several hours the sounds of heated discussion in the juryroom could be heard in the courtroom. At approximately 4:20 p.m. the jury requested answers from the Court on two questions:

1. When is a bomb a bomb?

2. Could you explain the difference between active and constructive possession?

The Court gave further instructions as to the elements required to establish existence of a bomb and then went on to elaborate on its previous instruction concerning active and constructive possession. The Court, in its supplementary instruction, initially correctly stated the law of constructive possession. It stated:

> "Constructive possession would be in a case where a person, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. If he does have that power and the intention, then he is in possession." (app. 408)

See, United States vs. Craven 478 F.2d 1329 (6th Cir. 1973) cert. denied 414 U.S. 866.

However, the Court then went on to say:

> "So if you find from the evidence, beyond a reasonable doubt, that the accused, Leo Hendricks, either alone or jointly with others - and in this case the other - well, whoever it was - Andrew Johnson at one point certainly from the evidence was one who was together with him when the bombs, if they were bombs, if you find that they were, were in the car.
>
> And if you find that the evidence to be true as to what was held up by Andrew Johnson with Leo Hendricks right behind him as they look into the bedroom of Evelyn Parracino that afternoon, if you find that at the time those were bombs that he held - and there is evidence from which you may, you are not required to, but you may infer that even at that time Leo Hendricks and Andrew Johnson had joint possession of a thing."

Appellant's counsel took exception to this supplementary charge on the basis that it incorrectly instructed the jury that Leo Hendricks could be found to be in possession of a firebomb nearly by being present at the same site as a firebomb. The Court was asked to reinstruct the jury to the effect that mere presence with an individual who has possession of something is not sufficient to charge that individual with having possession within the meaning of the law. See, United States vs. Prujansky, 415 F.2d 1045 (6th Cir. 1969). The Court refused to recall the jury for further instructions and within a matter of a few minutes the jury returned with a guilty verdict against the appellant. The Court's refusal to clarify its instruction as requested by defense counsel

was highly prejudicial and, under the circumstances of this case, approximated a directed verdict of guilty

CONCLUSION

For all the foregoing considerations the appellant respectfully moves the Court to reverse the judgment of conviction and order the Indictment dismissed against the appellant or, in the alternative to remand the matter to the District Court for a new trial.

Respectfully submitted,

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IN THE

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FOR THE SECOND CIRCUIT

DOCKET NO. 75-1220

UNITED STATES OF AMERICA

APPELLEE

V.

LEO HENDRICKS

APPELLANT

CERTIFICATION OF SERVICE

I hereby certify that a copy of the Brief and Appendix of the defendant-appellant in the above matter was mailed postage prepaid, to the office of the Assistant United States Attorney, Michael Hartmere, 915 Lafayette Square, Bridgeport, Connecticut. Dated at South Windsor, Connecticut August 8, 1975.

/Thomas G. Dennis/

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